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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 260

CITY BANK FARMERS TRUST COMPANY, ASSIGNEE OF FLORENCE H. BUGBEE, PETITIONER,

vs.

IRVING TRUST COMPANY, AS TRUSTEE OF THE ESTATE OF THE UNITED CIGAR STORES COMPANY OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 6, 1936.

CERTIORARI GRANTED OCTOBER 26, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

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UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT. 1

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

CITY BANK FARMERS TRUST COMPANY, assignee of Florence H. Bugbee,
Appellant,

IRVING TRUST COMPANY, as trustee of the estate of the above-named Debtor, et al.,
Appellees. 2

Statement Pursuant to Rule XIII.

This proceeding was commenced in the United States District Court for the Southern District of New York on or about October 5, 1934, by the filing of a proof of claim sworn to October 5, 1934, by the claimant, City Bank Farmers Trust Company, as assignee of Florence H. Bugbee, a former landlord of United Cigar Stores Company of America, the above-named Debtor. The Debtor filed its petition for reorganization under Section 77B of the Bankruptcy Act on or about June 9, 1934. 3

The original parties to the proceeding were said Claimant, City Bank Farmers Trust Company, Irving Trust Company, as trustee of the estate of the Debtor, and certain intervenors, to wit, Jacob Ruppert Realty Corporation, Peter Grimm, et al., as a Landlords' Protective Committee, Grayson M-P. Murphy, et al., as a Preferred Stockholders' Protective Committee, Lewis L. Strauss, et al., as a Bondholders' Protective Committee, and United Stores Corporation.

Statement Pursuant to Rule XIII.

United Stores Corporation subsequently withdrew as an intervenor, and thereafter Phoenix Securities Corporation intervened. The Debtor never appeared at nor participated in the hearing before the Special Master on the trustee's objection to the claim, nor at the hearing in the District Court upon the exceptions filed by the Claimant to the report of the Special Master recommending the disallowance of the claim, and counsel for the Debtor have notified counsel for the Claimant that it is not necessary to secure their consent to nor not to serve upon them copies of this transcript of record.

Irving Trust Company, as trustee of the estate of the Debtor, served upon the Claimant on or about April 10, 1935, a copy of its petition praying that a time be fixed by Hon. Irwin Kurtz, Special Master to whom said District Court had, by its order dated July 17, 1934, referred all claims for consideration and report, for hearing its objections to said claim, and also a notice notifying the Claimant that such hearing would be held on April 29, 1935.

The hearing before the Special Master on the trustee's objections was held before Hon. Irwin Kurtz, Special Master as aforesaid, on June 3, 1935, to which date said hearing had been duly adjourned.

The report of said Special Master dated September 18, 1935, recommended that the claim be expunged. An order of said District Court, confirming the report of the Special Master, was entered November 6, 1935. The order of said District Court allowing the appeal of the Claimant from said order entered November 6, 1935, to this Court is dated December 5, 1935.

No parties have been arrested or bail taken or property attached or arrested, and the Debtor's estate is in the possession of Irving Trust Company, as trustee as aforesaid.

Proof of Claim.

UNITED STATES DISTRICT COURT, 7

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In Proceedings for Reorganization of a Corporation.—No. 59886.

Proof of Claim 5458.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor. 8

United States of America,
Southern District of New York—ss.:

At the City of New York, County of New York, State of New York, on the date hereinafter set forth, came Nelson Stuart and made oath and says that.

I.

For an individual. 9

I am the claimant. My address is.....
.....

For a copartnership.

I am a member of a copartnership, the claimant, trading as.....
(Print name legibly)
..... at .....,
..... I have been authorized by said firm to make, execute and verify this proof of claim.

Proof of Claim.

10 For a corporation.

I am an officer of CITY BANK FARMERS TRUST COMPANY, the claimant, a corporation duly organized under the laws of the State of New York, having an office at 22 William Street, New York, N. Y. and am duly authorized to make, execute and verify this proof on behalf of said corporation.

For an agent.

I am an authorized agent of.....
....., the claimant, whose address is
11 .....; this deposition is not made by the claimant in person because .....
.....
I am duly authorized by said claimant to make, execute and verify this proof, and it is within my knowledge that the claim hereinafter mentioned was incurred as and for the consideration hereinafter stated, and that such claim, to the best of my knowledge and belief, still remains unsatisfied. My address is.....
.....

12 [In case none of the foregoing paragraphs is appropriate because the claim is held by executors, trustees, co-heirs, co-distributees, etc., or for any other reason, insert here the name and address of the person executing the proof of claim, the name or names of the owners of the claim, and the capacity in which the person executing the proof of claim is acting:]

II.

United Cigar Stores Company of America, the corporation which is the debtor in the above-entitled proceeding for reorganization (hereinafter called the Debtor), on August 29, 1932, filed its voluntary petition in bankruptcy and

was adjudicated a bankrupt in a proceeding in 13
the above-mentioned Court (Docket No. 55129), and Irving Trust Company was appointed trustee in bankruptcy of said bankrupt and acted as such trustee in bankruptcy (herein called the Trustee in Bankruptcy) until June 14, 1934, the date of approval of the petition herein.

The claimant is the present owner of a claim against the Debtor, based upon or arising out of the lease, dated March 22, 1922, between Florence H. Bugbee as Landlord, and the Debtor, as Tenant, covering the premises described therein, for a term commencing prior to August 14
29, 1932, and ending on April 1, 1946, or for injury resulting from the rejection of said lease by the Trustee in Bankruptcy on or about November 11, 1932, or for damages or indemnity under a covenant or covenants contained in said lease.

The Trustee in Bankruptcy surrendered the premises covered by said lease on November 11, 1932.

[Insert date on which possession of premises was turned over, or, if that date is not known, insert date of notice from Trustee in Bankruptcy that lease was rejected.]

The landlord reentered said premises on Novem- 15
ber 11, 1932.

Except to the extent hereinafter shown, neither the Debtor nor the Trustee in Bankruptcy has paid the rent or other obligations accruing under said lease after the 1st day of September, 1932.

[If the claimant is not the landlord named in the above-described lease, give explanation of how ownership of the claim was acquired, *i. e.*, by purchase of the premises, assignment, inheritance, or otherwise:]

The claim hereby made was assigned to City Bank Farmers Trust Company by Florence H. Bugbee by an instrument of assignment acknowledged September 27, 1934.

Proof of Claim.

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III.

See Schedule "A"

The Debtor was on and before June 14, 1934, the date of the approval of the petition herein, and still is, justly and truly indebted to the claimant for amounts payable under said lease or for injury resulting from the rejection of said lease by the Trustee in Bankruptcy or for damages or indemnity under a covenant or covenants contained in said lease, computed as follows:

(1) Total net or fixed rent for entire term which has not been paid by the Debtor	$203,750.00	
(2) Total taxes, insurance, assessments, water rents or rates and other payments required to be made by Debtor for entire term which have not been paid by the Debtor (use actual amounts so far as known and estimates for the future—see footnote 1)	115,381.09	
Total lease obligations which have not been paid by the Debtor		$319,131.09
Less:		
(3) Fair rental value of leased premises from date of rejection of lease to end of term (see footnote 2)	$232,115.16	
Dividends paid in bankruptcy proceeding on any claim based on original lease	$	
Amount paid by Trustee in Bankruptcy for use and occupation of premises by such trustee	$	

(4)	Amounts paid by subtenants of Debtor to landlord under original lease for occupancy up to date of rejection of lease	891.56	233,006.72
	Total amount claimed for entire term of original lease		$ 86,124.37

Claim is hereby made against the Debtor in the amount above set forth, together with such interest thereon as may be allowed by law.

1. Explain how future taxes, etc., are estimated:

2. If all or any part of the leased premises was relet to another tenant for all or any part of the balance of the term of the original lease, the terms of the new lease should be taken into consideration in making this estimate; a copy of the new lease should be attached to this proof of claim, marked Exhibit A, and the following information should be supplied:

Name of new tenant:
Date of commencement of term of new lease:
Date of expiration of term of new lease:
Net or fixed rent per year under new lease: $
Taxes and other payments per year under new lease: $
Explain how future taxes, etc., are estimated:
State also any other facts on which estimate of fair rental value is based, stating such facts, if necessary, on a separate page as a schedule hereto:

IV.

See Schedule "B"

This claim in the amount above set forth, together with interest thereon as aforesaid, is allowable on a parity with debts which would be provable under Section 63 (a) of the Bankruptcy Act to the extent of the amount provided in subdivision (b) of Section 77B of the Bankruptcy Act, which said amount is computed as follows:

(1)	Net or fixed rent accrued up to date of surrender of premises or date of reentry by landlord, whichever first occurred, and not paid by the Debtor	$ 2,957.26

(2)	Taxes, assessments, insurance, water rents or rates and other payments accrued up to date of surrender of premises or date of reentry by landlord, whichever first occurred, and not paid by the Debtor	1,724.08	
	Total lease obligations accrued up to date of surrender of premises or date of reentry by landlord, whichever first occurred, and not paid by the Debtor		$ 4,681.34
	Less:		
	Dividends paid in the bankruptcy proceeding on any claim based on original lease	$	
	Amount paid by Trustee in Bankruptcy for use and occupation of premises by said trustee	$	
(3)	Amounts paid by subtenants of Debtor to landlord under original lease for occupancy up to date of surrender of premises or date of reentry by landlord, whichever first occurred	$ 891.56	891.56
	Unpaid lease obligations accrued up to date of surrender or reentry; whichever first occurred		$ 3,789.78
(4)	Net or fixed rent reserved in lease (without acceleration) for three years next succeeding date of surrender of premises or date of reentry by landlord, whichever first occurred, or for entire balance of term if less than three years	$ 45,000.00	

(5) Taxes, assessments, insurance, water rents or rates and other payments to be made by Debtor during three years next succeeding date of surrender of premises or date of reentry by landlord, whichever first occurred, or for entire balance of term if less than three years	24,728.07	
Total lease obligations for three year period above described, or for entire balance of term if less than three years		69,728.07
Total amount of claim allowable under Section 77B on a parity with debts which would be provable under Section 63 (a)		$ 73,517.85

Claim is hereby made against the Debtor in the amount above set forth, together with such interest thereon as may be allowed by law, on a parity with debts which would be provable under said Section 63 (a).

V.

To the extent that the total amount of the claim for the entire term of the original lease, as hereinabove set forth in subdivision III hereof, is not allowable on a parity with debts which would be provable under said Section 63 (a), said claim should be allowed in subordination to debts so provable, but in priority to the claims or interests of holders of preferred and common stock of the Debtor.

VI.

No part of the claim herein asserted has been paid, and there are no setoffs or counterclaims thereto except as follows:

The claimant has not nor has any person for

or on behalf of the claimant, to deponent's knowledge or belief, had or received, for the use or benefit of the claimant, any security for said debt, except as follows:

No judgment has been rendered therefor, nor for any part thereof, but a claim based on said lease was filed in said bankruptcy proceeding and was allowed in the amount of $. See Schedule C.

In executing and filing this proof of claim, the claimant in no way waives any rights which the claimant may have to reclaim specific assets and expressly reserves such rights.

Name ..... (L. S.)
(Individual)

By .....
Agent (if executed by Agent)

CITY BANK FARMERS TRUST COMPANY,
Affix Corporate Seal
By NELSON STUART
(Corporate Seal)

Address to which all notices should be mailed:
Mrs. Florence H. Bugbee,
c/o Richard S. Wilson, Esq.,
1018-19 Trenton Trust Bldg.,
Trenton, New Jersey.

(Seal)
Subscribed and sworn to before me
this 5th day of October, 1934.

H. WILLIAMS,
Notary Public.
Kings County Clerk's No. 531.
Kings County Register's No. 5296.
New York County Clerk's No. 823.
New York County Register's No. 5-W-538.
Commission expires March 30th, 1935.

[Schedules annexed to proof of claim having a bearing upon the amount of the claim omitted.]

Notice of Hearing on Trustee's Objection to Claim.

5458 31

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

In proceedings for reorganization of a corporation. No. 59,886.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor.

32

PLEASE TAKE NOTICE that upon the annexed petition of Irving Trust Company, Trustee of the estate the above-named Debtor, verified April 9, 1935, a hearing will be held before Hon. Irwin Kurtz, Special Master, at 15 Park Row, Borough of Manhattan, City of New York, N. Y., on April 29, 1935, at 11:30 o'clock in the forenoon, or as soon thereafter as counsel may be heard, and that at said hearing the undersigned will move this Court to have the claim referred to in said petition expunged and barred from participation in any plan of reorganization confirmed by the Court in these proceedings. 33

Dated, New York, N. Y., April 10, 1935.

Yours, etc.,

CRAVATH, DE GERSDORFF,
SWAINE & WOOD,
Attorneys and Solicitors for Irving
Trust Company, Trustee of the
Estate of United Cigar Stores
Company of America, Debtor,
Office and Post Office Address,
No. 15 Broad Street,
Borough of Manhattan,
New York, N. Y.

Notice of Hearing on Trustee's Objection to Claim.

To:

MRS. FLORENCE H. BUGBEE,
c/o Richard S. Wilson,
1018-19 Trenton Trust Bldg.,
Trenton, N. J.

ROSENBERG, GOLDMARK & COLIN,
165 Broadway,
New York, N. Y.,
Attorneys for Debtor.

M. CARL LEVINE,
535 Fifth Avenue,
New York, N. Y.,
Attorney for Jacob Ruppert
Realty Corporation.

MITCHELL, TAYLOR, CAPRON & MARSH,
20 Exchange Place,
New York, N. Y.,

and

RALPH MONTGOMERY ARKUSH,
15 Broad Street,
New York, N. Y.,
Attorneys for Landlords' Protective Committee.

SHEARMAN & STERLING,
55 Wall Street,
New York, N. Y.,

and

BERLE & BERLE,
70 Pine Street,
New York, N. Y.,
Attorneys for Preferred Stockholders' Protective Committee.

Petition of Trustee for Hearing Its Objections to Claim.

37

DAVIS, POLK, WARDWELL, GARDINER & REED,
15 Broad Street,
New York, N. Y.,
Attorneys for Debentureholders Protective Committee.

SULLIVAN & CROMWELL,
48 Wall Street,
New York, N. Y.,
Attorneys for United Stores Corporation.

38

Petition of Trustees for Hearing Its Objections to Claim.

DISTRICT COURT OF THE UNITED STATES.
SOUTHERN DISTRICT OF NEW YORK.

In proceedings for reorganization of a corporation. No. 59,886.

In the Matter
of

39

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

To the Honorable Irwin Kurtz Special Master:

The petition of Irving Trust Company, as Trustee of the estate of the above-named Debtor, respectfully shows to the Court as follows:

On June 14, 1934, your petitioner was appointed temporarily and qualified as Trustee of the estate of the above-named Debtor, and on

Petition of Trustee for Hearing Its Objections to Claim.

July 17, 1934, the appointment of your petitioner as Trustee was made permanent.

There has been filed with this Court a proof of claim numbered 5458 by City Bank Farmers Trust Company as assignee of Mrs. Florence H. Bugbee (hereinafter called the Claimant) setting forth an alleged claim of the Claimant against the Debtor in the sum of $86,124.37 with interest. Your petitioner objects to the allowance of said claim for the following reasons:

The Trustee objects to the allowance of this claim for the reason that the lease upon which the claim is based contains no indemnity clause or other provision privileging the landlord thereunder, the claimant's assignor, to hold the Debtor for rent or for damages accruing after the termination of the lease by such landlord. The Trustee is advised that said landlord re-entered the leased premises in November, 1932 and relet the same to other tenants and thereby worked a forfeiture of the lease, terminating all future obligations of the Debtor thereunder.

Your petitioner, accordingly, desires to have its objections to said claim heard and considered, and said claim expunged and barred from participation in any plan of reorganization confirmed by the Court in these proceedings.

This petition and all proceedings had thereon are not intended to affect in any way, or to waive any rights of your petitioner in regard to, the questions reserved by the Court for further determination as provided in its order of July 17, 1934 as amended, and, except as specifically stated in the foregoing objections, your petitioner reserves its right of objection, as provided by order of this Court dated November 13, 1934,

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with respect to all questions relating to the scrutiny of the circumstances of an assignment of future rent claims and the amount of the consideration paid for such assignment in determining the amount of damages to be allowed the assignee thereof, and the limitation of claims filed by committee members or agents to the actual consideration paid therefor.

WHEREFORE, your petitioner respectfully requests that a time be fixed by this Court for hearing your petitioner's objections to said claim of which due notice to the Claimant and to all 44 persons and parties who have intervened in these proceedings, or to their attorneys, shall be given by mail.

Dated, April 9, 1935.

IRVING TRUST COMPANY,
as Trustee of the Estate of United Cigar
Stores Company of America, Debtor,
by JOSEPH T. STEARNS,
Assistant Secretary.

CRAVATH, DE GERSDORFF, SWAINE & WOOD, 45
Attorneys and Solicitors for said Trustee,
No. 15 Broad Street,
Borough of Manhattan,
New York, N. Y.

Petition of Trustee for Hearing Its Objections to Claim.

46

United States of America,
Southern District of New York,
State of New York,
County of New York—ss.:

JOSEPH T. STEARNS, being duly sworn, deposes and says that he is an Assistant Secretary of Irving Trust Company, the petitioner herein, and that he has read the foregoing petition and knows the contents thereof, and is informed and verily believes that the same is true.

47

JOSEPH T. STEARNS.

Subscribed and sworn to before me this
9th day of April, 1935.

ANNE L. RANDBY.
ANNE L. RANDBY,
Notary Public,
Kings County.
Kings Co. Clk's No. 376, Reg. No. 7051.
N. Y. Co. Clk's No. 95, Reg. No. 7 R 64.
Ctf. filed N. Y. Co.
Commission expires March 30, 1937.

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Stenographic Minutes of Hearing Before Special Master on Objections to Claim.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

(In Bankruptcy.)

No. 59886.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor.

New York, June 3, 1935,
11:30 o'clock, A. M.

Before—IRWIN KURTZ, Esq., *Special Master.*

Hearing on Objection to Claim Designated as No. 5458.

Proceeded Pursuant to Notice.

APPEARANCES:

MESSRS. CRAVATH, DE GERSDORFF, SWAINE & WOOD, Attorneys for the Trustee, by R. L. Gilpatric and B. R. Shute, Esqs., of Counsel.

M. CARL LEVINE, Esq., Attorney for Jacob Ruppert Realty Corporation and others, Intervenors-Claimants, by David Morgulas, Esq., of Counsel.

MESSRS. BERLE & BERLE, Attorneys for Preferred Stockholders' Protective Committee, Intervenors, by Winthrop Kellogg, Esq., of Counsel; and

Stenographic Minutes of Hearing Before Special Master on Objection to Claim.

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MESSRS. SHEARMAN & STERLING, Associate Counsel, by Douglas Steimle, Esq., of Counsel.

MESSRS. MITCHELL, TAYLOR, CAPRON & MARSH, Attorneys for Landlords' Protective Committee and others, Intervenor and Claimants, by Ralph M. Arkush, Esq. and Henry L. Glenn, Esq., of Counsel.

MESSRS. SULLIVAN & CROMWELL, Attorneys for United Stores Realty Corporation, Intervenor-Claimants, by Alexander M. Grean, Jr., Esq., of Counsel.

53

MESSRS. DAVIS, POLK, WARDWELL, GARDINER & REED, Attorneys for Debentureholders' Committee, by Edward R. Wardwell, Esq., of Counsel.

The Master: This is claim No. 5458, filed by the City Bank Farmers Trust Company (Florence H. Bugbee). Claim filed in the sum of $86,124.37.

MESSRS. MITCHELL, TAYLOR, CAPRON & MARSH, Attorneys for the Claimant, by Henry L. Glenn, Esq., of Counsel.

Mr. Glenn: We offer a stipulation of the
54 facts signed by counsel for the claimant, counsel for the trustee and counsel for all the intervenors, reserving the question of the amount of damages in the event that the validity of the claim is established.

The Master: Mark it.

(Document referred to is received in evidence and marked, Claimant's Exhibit 8, of this date.)

The Master: July 3, 1935 for claimant's brief. July 17, 1935 for answering memoranda. July 24, 1935 for reply.

(Thereupon at 12:15 o'clock, A. M., the hearing was closed.)

Stipulation of Facts.

55

UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

In Proceedings for Reorganization of a Corporation.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor.

56

Stipulation of facts agreed upon by and between the undersigned relating to claim No. 5458 filed in the above matter by City Bank Farmers Trust Company.

On March 22, 1922 Florence H. Bugbee and the above named debtor entered into a written lease, whereby the said debtor leased from the said Florence H. Bugbee premises situate at the southwest corner of East State and South Broad Streets, Trenton, New Jersey, for the term of twenty years from April 1, 1926 at the yearly rent of $13,500 for the first five years of the term commencing April 1, 1926 and expiring March 31, 1931, and thereafter at the yearly rental of $15,000 for the balance of the term. Said debtor also covenanted to pay all water rents, taxes and insurance premiums. It is admitted that the copy of the lease which is attached hereto is the lease entered into between the parties.

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The said debtor entered into possession of the premises under the lease and paid monthly to the lessor its annual fixed rent to September 1, 1932 and paid to the City of Trenton annual assessed

58 taxes to July 1, 1932 and assess water rents to May 23, 1932. On August 29, 1932 said debtor was adjudicated bankrupt, the term of said lease not having yet expired. Thereafter the Irving Trust Company was appointed trustee in Bankruptcy of said debtor and on November 11, 1932, by order of the referee herein, notified the lessor of its rejection of the lease. Between the date of the adjudication in bankruptcy and the rejection of the lease, the premises were occupied by subtenants of the bankrupt, from whom the trustee collected rents and which were paid to the lessor
59 upon the order of said referee.

After the rejection of the lease, the lessor leased the premises. At the time of filing the claim herein, the leases existing were as follows:

Name of new tenant: United Perfumery Co., Inc.

Date of commencement of term: June 1, 1934.

Date of expiration of term: June 1, 1939.

Minimum fixed rent per year: $10,000.

Name of new tenant: Sylvia Rosen.

60 Date of commencement of term: Dec. 1, 1933.

Date of expiration of term: Dec. 1, 1935.

Minimum fixed rent per year: $960.

Name of new tenant: Bellcamp Stores, Inc.

Date of commencement of term: March 1, 1934.

Date of expiration of term: March 1, 1939.

Minimum fixed rent per year: $4,500.

Name of new tenant: Edward Brailove.

Date of commencement of term: Oct. 1, 1934.

Date of expiration of term: Oct. 1, 1936. 61
Fixed rent per year: $720.
Name of new tenant: The R. C. Maxwell Co.
Date of commencement of term: Nov. 15, 1932.
Date of expiration of term: Nov. 15, 1933.
Fixed rent per year: $480.

There was also existing the following verbal month to month tenancies, as follows:

John Lini, at the monthly rent of $25.
Abe Greenberg, at the yearly rent of $380. 62

Since the filing of the claim, the lessor has entered into a verbal month to month tenancy for part of said premises with So. End Republican Club, at the monthly rent of $30. All of said premises are occupied except half of the third floor having a rental value of $30 per month, which rental value is based upon rent being received from So. End Republican Club for the other half of said floor.

On June 7, 1934 the bankrupt instituted in said bankruptcy proceedings a proceeding for reorganization under the provision of Section 77B 63
of the Bankruptcy Act, as amended by the Act of June 7, 1934. Said Section 77B recognizing, within certain limits, a claim resulting from the rejection of leases, said Florence H. Bugbee assigned her claim to City Bank Farmers Trust Company by an instrument of assignment acknowledged September 27, 1934.

Upon the hearing as to this claim upon the above stipulation of facts and the supplementary statement of facts attached hereto, no question of

Stipulation of Facts.

64 the amount of damages will be in issue, such question being reserved for future determination.

Dated, May . 1935.

MITCHELL, TAYLOR, CAPRON & MARSH,
Attorneys for Claimant.

CRAVATH, DE GERSDORFF, SWAINE & WOOD,
Attorneys for Trustee.

The undersigned counsel for the intervenors in
65 the above entitled proceedings hereby consents to the filing with the Special Master of the above stipulation.

M. CARL LEVINE,
Attorney for Jacob Ruppert Realty Corporation.

BERLE & BERLE
and
SHEARMAN & STERLING,
Attorneys for Preferred Stockholders Protective Committee.

66

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for Debentureholders Protective Committee.

SULLIVAN & CROMWELL,
Attorneys for United Stores Corporation.

Lease.

67

INDENTURE, made this 22nd day of March, 1922 between FLORENCE H. BUGBEE, residing at No. 231 West State St., City of Trenton, New Jersey, hereinafter called "Lessor", and UNITED CIGAR STORES COMPANY OF AMERICA, a New Jersey corporation, having an office at No. 44 West 18th Street, Borough of Manhattan, City and State of New York, hereinafter called "Lessee", WITNESSETH:

That the lessor doth lease and demise, unto the lessee, and the lessee doth hire and take from 68 the lessor, ALL THAT CERTAIN building and premises situate at the Southwest corner of East State Street and South Broad Street, in the City of Trenton and the State of New Jersey, bounded and described as follows: to wit:

BEGINNING at the intersection of the southerly line of East State Street and the westerly line of South Broad Street (said lines of said streets forming an angle of ninety-eight degrees and fifty-eight minutes turning said angle from south to west) and runs thence (1) westerly, along said line of State 69 Street nineteen and five-tenths feet, to a point, said point being opposite the center of a nine inch party wall dividing the building on the lot herein described from the one on the lot adjoining on the west, now owned by Adam Fischer; thence (2) southerly, on a line through the center of said wall, being the easterly line of said Fischer's lands (said line forming an angle of eighty-five degrees and twenty-seven minutes with the line of State Street turning said angle from east to

70 south) sixty-three and seventy-eight one-hundredths feet, to a point in the northerly face of a nine inch wall, said point being twenty-four and seventeen one-hundredths feet westerly along the face of said wall measured at right angles from the line of South Broad Street, at a point in said line of said Street distant sixty and forty-two one-hundredths feet southerly from the southwesterly corner of Broad and State Streets, said point being also the southeasterly corner of lands of said Fischer; thence (3) westerly, along the face of said wall, (forming an angle of ninety-
71 four degrees and forty-seven minutes with the line of the second course herein, turning said angle from north to west) being also the southerly line of land of said Fischer, twenty-one and thirty-three one-hundredths feet to a point, said point being opposite the center of the wall dividing the building on lands of said Fischer from the one on other lands, fronting on State Street, of Wm. I. Vannest on the west, and being also the southwesterly corner of lands of said Fischer; thence (4) southerly, parallel to the
72 line of South Broad Street, and along line of land and remaining to William I. Vannest (this line forming an angle of ninety degrees and twenty-two minutes with that of the preceding course herein, turning said angle from south to east), twenty-one and ninety-three one hundredths feet, to a point in the northerly line of a three feet wide alley leading westerly from Broad Street along the northerly line of lands late of Solomon S. and Barney V. Wolfson, late of Doctor James M. Davis; thence (5) easterly along said line of said alley (said line forming an angle of

ninety-eight degrees and fifty-one minutes with the line of the preceding course herein, turning said angle from north to east) said line being distant three feet northerly and parallel to the northerly line of land of said Wolfson's forty-five and five-tenths feet, to a point in the westerly line of South Broad Street; thence (6) northerly, along said line of said street, eighty-two and fifty-two one-hundredths feet, to the point and place of beginning (the line of this course forms an angle of ninety degrees and nine minutes with that of the preceding course herein, turning said angle from north to west). Together with the free and common use of said three feet wide alley on the south, as per agreement and release entered into by and between Joseph G. Brearley et al, and Isaac Gould et al, dated March 30, 1855 and recorded May 7, 1855 in Deed Book Liber 33, pages 7-11, in the Office of the Clerk of Mercer County, Subject, however, to the right of Adam Fischer, to build into the wall which is now the southerly boundary of his lot fronting on State Street, (being the third course of the above description) as per agreement above referred to, between the first and second parties thereto with the appurtenances; being the same premises now occupied by the lessee under certain lease dated December 13, 1915 made and executed by Wilbur F. Sadler, Jr. to the United Merchants Realty & Improvement Company.

TO HAVE AND TO HOLD the premises hereby demised unto the lessee, its successors and assigns for a term of twenty (20) years commencing on April 1, 1926 and expiring on March 31, 1946 at

the yearly rent of Thirteen Thousand Five Hundred Dollars ($13,500.00) for the first five years of the term commencing April 1, 1926 and expiring March 31, 1931, and thereafter at the yearly rental of Fifteen Thousand Dollars ($15,000.00) for the balance of the term, payable in equal monthly payments in advance on the first day of each and every month during the term.

And it is agreed by and between the parties hereto that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said lessor, without notice, to re-enter the said premises and to remove all persons therefrom, or to proceed by action at law for the recovery of the possession of the same.

The lessee does further covenant and agree to pay and discharge all water rents and water rates and taxes assessed, levied and imposed upon demised premises during the term of this lease within thirty (30) days after the same become due and payable, such water rates, rents and taxes to be apportioned between the parties for the first and last years of the term, the lessor to pay one-fourth and the lessee to pay three-fourths for the year 1926, and the lessor to pay three-fourths and the lessee to pay one-fourth for the year 1946. In the event this lease commences prior to April 1, 1926 as hereinafter provided then the taxes for the year in which this lease commences shall be apportioned between the parties hereto.

The lessee shall have the right to contest or review by legal proceedings or in such other manner as it deems suitable, which proceedings, if instituted, shall be conducted promptly at its own expense and free of expense to the lessor (but lessor covenants and agrees to join in such ap-

plications if required by laws, requirements, regu- 79
lations or authorities wherein premises are lo-
cated) any taxes, water rates or charges imposed
upon or against the parcel of land or building
or improvements thereon above described, and in
case any such taxes, water rates or charges shall,
as a result of any such proceedings or otherwise,
be reduced, cancelled, set aside or to any extent
discharged, and upon the determination of such
proceedings, the lessee shall pay the amount that
shall be finally assessed or imposed against said
premises or be adjudicated to be due and payable
on any such disputed or contested items. The
legal proceedings herein referred to shall include 80
appropriate appeals from any judgments, decrees
or orders and certiorari proceedings and appeals
from orders therein, but all such legal proceedings
shall be begun as reasonably soon as possible after
the imposition of any contested lien and shall be
prosecuted to final adjudication with all prompt-
ness and despatch.

And the said lessee covenants to pay to the said
lessor the said rent at the times and in the man-
ner as herein specified and to pay the said water
rates, water rents and taxes assessed, levied and
imposed upon the demised premises during the 81
term at the times and in the manner hereinbefore
prescribed, and that at the expiration of the said
term, or other determination of this lease, the
said lessee will quit and surrender the premises
hereby demised in as good state and condition as
reasonable use and wear thereof will permit,
damages by fire and the elements excepted.

And the said lessee hereby covenants and agrees
that all repairs necessary for the good and safe
condition of the demised premises during the term
of this lease, it will perform and make at its own
expense.

82 And the said lessee further covenants and agrees that it will, at its own expense, make such alterations and/or improvements upon the premises hereby demised as it shall desire, and lessor hereby consents to the making of any such alterations and/or improvements by lessee, said improvements to belong to and become the property of the lessor at the expiration or other determination of this lease.

The lessee shall at its own expense insure any building now or hereafter forming part of demised premises for the full insurable value thereof
83 in a good, reliable insurance company or companies authorized to do business in the State of New Jersey in the name of and for the benefit of lessor and shall keep said building so insured during the entire term of this lease, and all premiums upon said fire insurance policies shall be paid by lessee in addition to the rent. In the event that any building now or hereafter forming part of demised premises shall be partially damaged by fire or other casualty or happening during the term, then said building shall be restored to its condition immediately prior to such damage with due diligence by lessor and all in-
84 surance moneys collected upon any policies of insurance upon demised premises shall be paid over to lessor, who shall repair or replace the loss with the insurance money received but shall not be called upon to advance any additional sum, and the rent and taxes until such repairs shall have been made shall be apportioned in proportion to the part of the premises which is still usable. In case the building forming part of demised premises or any building hereafter erected upon the land forming part of demised premises shall be substantially destroyed by fire or other casualty or happening prior to April 1,

1943, then lessor shall erect with due diligence 85
a new building upon the land forming part of demised premises substantially similar to the building so destroyed, and all insurance moneys collected upon any policies of insurance upon the demised premises shall be paid over to the lessor, who shall expend the insurance money in replacing the building in so far as same will go but if that sum is not sufficient the lessee will supply additional funds, and any unearned rent and taxes paid in advance shall be refunded to lessee. The rent and taxes payable hereunder shall abate until the new building is ready for use and occupancy by lessee. In case the building forming 86
part of demised premises or any building hereafter erected upon the land forming part of demised premises shall be substantially destroyed by fire or other casualty or happening between April 1, 1943 and April 1, 1946 then this lease shall cease and come to an end as of the date of such destruction, and the insurance collected shall belong to the lessor and any unearned rent and taxes paid in advance by the lessee shall be refunded to it.

It is expressly understood and agreed that in the event the building now forming part of de- 87
mised premises and now occupied by lessee under lease dated December 13, 1915 between Wilbur F. Sadler, Jr., as landlord, and United Merchants Realty & Improvement Company, as tenant, which lease by its terms expires April 1, 1926, shall prior to April 1, 1926 become untenantable and be demolished or destroyed by governmental order or otherwise, and as a result thereof said lease hereinbefore in this paragraph referred to shall cease and terminate, then and in that event this lease between Florence H. Bugbee, as lessor, and United Cigar Stores Company of America, as

lessee, shall commence upon the completion of the demolition of said present building and shall continue up to and including March 31, 1946; and the rental payable by lessee to lessor shall be as follows: Ten Thousand Dollars ($10,000.00) per annum from the date of the commencement of said lease up to and including March 31, 1926, Thirteen Thousand Five Hundred Dollars ($13,500.00) per annum for the period commencing April 1, 1926 and expiring March 31, 1931, and Fifteen Thousand Dollars ($15,000.00) per annum for the balance of the term commencing April 1, 1931 and expiring March 31, 1946, excepting that no rental shall be due or payable by lessee to lessor for the first six (6) months of the term unless within such six months period the new building hereinafter referred to shall have been erected and completed and ready for occupancy by lessee. In the event the lease dated December 13th, 1915, between Wilbur F. Sadler, Jr. and United Merchants Realty and Improvement Company covering the demised premises and hereinbefore referred to, shall cease and terminate as in this paragraph provided, then and in that event the lessee covenants and agrees to promptly upon the commencement of the term at its own expense and cost to demolish the present building and erect and complete upon the land forming part of the demised premises a new building three stories in height (including the store or ground floor) with stores on the ground or grade floor and suitable for any lawful commercial and mercantile business and offices, lofts or salesrooms or apartments or other lawful purposes on the upper two floors; such new building to be erected in accordance with building laws of the City of Trenton and State of New Jersey, and the lessor covenants and agrees to promptly pay over to the

lessee a sum equal to the amount of any insurance 91
paid by insurance companies upon said present building in case it is damaged or destroyed by fire before the commencement of demolition; and the lessee covenants and agrees to indemnify and save harmless the lessor of and from any claims or demands, suits or actions at law for injuries or damages to persons or property resulting from the demolition of the old and the erection of such new building, and from the use of said building, street, streets or sidewalks in front thereof during the continuation of this lease. All provisions of this lease applicable to the present 92
building forming part of demised premises shall apply with full force and effect to the new building, if any, so to be erected by lessee, and to any other building erected in lieu or place thereof during the term of this lease. All provisions of this lease applicable to the time covered by the present lease (made by Wilbur F. Sadler, dated December 19, 1915 ending April 2, 1926) concerning insurance premiums, the collection and disposition of insurance, the payment of taxes and water rents, and the making of necessary repairs by the lessee, and its assumption of liability for damages to persons or property shall be un- 93
derstood to apply immediately upon the commencement of demolition of the present buildings by lessee.

And the said lessor covenants that the said lessee on paying the said yearly rent and performing the covenants aforesaid shall and may peaceable and quietly have, hold and enjoy the said demised premises for the term aforesaid.

And the said lessee further covenants that it will not assign this lease without first obtaining the written consent of the lessor, but the lessee may sublet the whole or any portion of the de-

94 mised premises for any lawful business not extra-hazardous on account of fire.

And it is expressly understood and agreed that this lease is to be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns only in case the demolition of the present building is commenced before August 1, 1922.

IN WITNESS WHEREOF, the said lessor has hereunto set her hand and seal, and the said lessee has set its corporate seal attested by its Secretary, and caused these presents to be signed by its
95 Vice-President the day and year first above written.

Signed, sealed and delivered
In the presence of:

FLORENCE H. BUGBEE
UNITED CIGAR STORES COMPANY
OF AMERICA,
By WM. BAEDER
Vice-President.
(Seal)

96 (Acknowledgments.)

Supplemental Stipulation of Facts.

97

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Proceedings for Reorganization of a Corporation.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor.

98

Supplemental stipulation of facts agreed upon by and between the undersigned relating to claim No. 5458 filed in the above matter by City Bank Farmers Trust Company.

On November 15, 1932, immediately after rejection by the Trustee in Bankruptcy of the original lease with the United Cigar Stores Company, Florence H. Bugbee entered into a lease with Kaufman Hats, Inc., whereby she let store known as No. 5 South Broad Street for the term of five years from January 1, 1933 at the yearly rent or sum of $5500. to be paid in equal advance 99
monthly payments. Between November 15, 1932 and March 1, 1933, Kaufman Hats, Inc. became the Bellcamp Stores, Inc. and on March 1, 1933 said Florence H. Bugbee entered into a lease with Bellcamp Stores, Inc., whereby she let the said store for the term of one year from March 1, 1933 at the yearly rent of $4500. to be paid in equal advance monthly payments and ten per cent of the gross receipts in excess of $4500. per year, to be paid semi-annually. On March 1, 1934 this

100 lease was renewed, as shown by statement in original stipulation.

On the date of rejection by the Trustee in Bankruptcy of the original lease with the United Cigar Stores Company, the American Radio Company was in possession of store known as No. 1 South Broad Street as sub-tenant of the United Cigar Stores Company. Immediately thereafter Florence H. Bugbee let the said store to American Radio Company at the monthly rent of $250., which tenant remained in possession until on or about January 1, 1933. On December 3, 1932,
101 Florence H. Bugbee entered into a lease with United Perfumery Company, Inc., whereby she let No. 1 South Broad Street and all of the first floor space remaining for the term of five years to commence on February 1, 1933 at the annual rent of $10,000. payable in equal monthly installments in advance on the first day of each month for the first year and at the annual rent of $12,000. payable in equal monthly installments in advance on the first day of each month for the second, third, fourth and fifth years. On June 1, 1934 a new lease was entered into between the parties, as shown by statement in original stipulation.

102 On the date of rejection by the Trustee in Bankruptcy of the original lease with the United Cigar Stores Company, the second floor loft of the premises was in possession of Day Clothing Company as sub-tenant of the United Cigar Stores Company. Immediately thereafter Florence H. Bugbee let the said loft to Day Clothing Company at the monthly rent of $250. and said tenant remained in possession for two months. On March 20, 1933, Florence H. Bugbee entered into a lease with George Green, whereby she let one-half of said loft for the term of five years from April

15, 1933 at the yearly rent of $1110. to be paid 103
in equal monthly payments. The said George Green failed to carry out his contract and on December 1, 1933 Florence H. Bugbee entered into a lease with Sylvia Rosen for said space, as shown by statement in original stipulation. The remaining half of said second floor loft remained vacant until October 1, 1934, when Florence H. Bugbee entered into a lease with Edward Brailove, as shown by statement in original stipulation.

On the date of rejection by the Trustee in Bankruptcy of the original lease with the United Cigar Stores Company, the third floor loft of the prem- 104
ises was in possession of John Lini as sub-tenant of the United Cigar Stores Company. Immediately thereafter Florence H. Bugbee let the said loft to John Lini at the monthly rent of $70. He remained in possession of said space until sometime after the filing of the claim herein, during which possession rent was reduced to $25. per month. Since the filing of the claim, one half of said space has been rented to So. End Republican Club at the monthly rent of $30.

M. CARL LEVINE,
BERLE & BERLE, 105
SHEARMAN & STERLING,
DAVIS, POLK, WARDWELL,
GARDINER & REED,
SULLIVAN & CROMWELL,
MITCHELL, TAYLOR, CAPRON
& MARSH,
CRAVATH, DE GERSDORFF,
SWAINE & WOOD.

Notice of Making and Entry of Report of Special Master.

106

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Proceedings for Reorganization of a Corporation. No. 59,886.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor.

107

Sir:

PLEASE TAKE NOTICE that the within is a true copy of a report made and entered herein on September 18, 1935, by Hon. Irwin Kurtz, Special Master herein.

Dated, September 19, 1935.

Yours, etc.,

CRAVATH, DE GERSDORFF,
SWAINE & WOOD,
Attorneys and Solicitors for Irving
Trust Company, Trustee of the
Estate of United Cigar Stores
Company of America, Debtor,
Office and Post Office Address,
No. 15 Broad Street,
New York, N. Y.

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To:

RICHARD S. WILSON, ESQ.,
Attorney for Mrs. Florence H. Bugbee,
1018-19 Trenton Trust Building,
Trenton, New Jersey.

Report of Special Master Recommending Disallowance of Claim.

109

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In proceedings for reorganization of a corporation. No. 5458.

No. 59,886.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA, Debtor.

110

To the Honorable Judges of the United States District Court, Southern District of New York:

I, IRWIN KURTZ, Special Master herein, do hereby respectfully report, as follows:

This is an application to expunge the claim of the City Bank Farmers Trust Company, Assignee of Mrs. Florence H. Bugbee, Landlord, for damages based upon the rejection of the lease herein, on November 14th, 1932, by the Irving Trust Company, as Trustee in Bankruptcy of United Cigar Stores Company of America, Bankrupt. The Trustee in Reorganization objects to the allowance thereof, for the reason that the lease was terminated by the Landlord, by her re-entry and reletting of the premises on November 15th, 1932, which it contends resulted in the termination of liability of the Tenant as a matter of law, and also by the very agreement

111

112

of the parties, in that the lease contained no covenant of indemnity or other provision for the continued liabllity of the Tenant after such termination. The Landlord urges her claim by virtue of Section 77-B of the Bankruptcy Act which was enacted on June 7th, 1934.

The situation presented herein, is as follows: On March 22nd, 1922 Florence H. Bugbee, as Landlord, entered into a lease with the United Cigar Stores Company of America (United), for certain premises located in Trenton, New Jersey,

113 for a term of twenty (20) years, commencing April 1st, 1926, at a graded rental commencing at Thirteen thousand five hundred ($13,500) Dollars per year, together with taxes, water rents, and insurance premiums.

On August 29th, 1932, the United filed its voluntary petition in bankruptcy, and was adjudicated on that day. At said time, the demised premises were not occupied by the Bankrupt but were entirely sublet to various tenants.

On November 14th, 1932 the Trustee notified the Landlord of its rejection pursuant to an order obtained from the Referee in Bankruptcy. There-

114 upon the Landlord, on the following day, November 15th, 1932, relet part of the demised premises and thereafter proceeded to relet other parts thereof. The lease contained no provisions for the continued liability of the tenant in the event of the termination of the lease.

Obviously, if this reentry by the Landlord and reletting of the premises terminated the lease, the liability of the United for further rent was also terminated as a matter of law, and particularly by virtue of the fact as aforesaid, that the lease contained no provisions for the continued liability of the United.

Report of Special Master Recommending Disallowance of Claim.

115

Therefore, upon such termination, the Landlord had no valid or legal claim whatsoever against the United for the further payment of rent; she not only had no provable claim in bankruptcy but, in fact, had no legal claim which would have survived the United's discharge in the said bankruptcy proceeding. Accordingly, she had no valid or legal claim against the United when the Petition of Reorganization herein under Section 77-B was approved on June 14th, 1934. Section 77-B of the Bankruptcy Act could not and did not create any valid and legal claims against a Debtor where none existed prior to the enactment of said Section. (Special Master's Report dated September 17th, 1935 in these proceedings recommending the disallowance of the claim of L. M. Norwood et al., #5026, based upon a termination of a lease, which did not contain any covenant of indemnity.)

116

However, the Landlord in her Brief now attacks the legal effect of her reentry as asserted by the Trustee. She urges that her resumption of control and the reletting of the premises on November 15th, 1932, immediately after the receipt of the formal notification of the rejection of the lease by the Trustee in Bankruptcy, did not as a matter of law in the State of New Jersey, where the demised premises are located, result in a termination of the lease, and the termination of all further liability for rent by the United. She contends that her reentry as aforesaid, was merely for the purpose of reletting the premises solely for the benefit of the United, and that she at no time resumed control thereof for her own account.

117

We must visualize the situation as it existed in November 1932, and the Landlord's actions in

118 accordance therewith. She undoubtedly realized that a Landlord had no provable claim in bankruptcy for future rent. Under the circumstances, everything else being equal, with the premises entirely sublet, it would have been unlikely for her to have not resumed control of the premises for her own benefit, and to have merely continued to consider the same, as the leased premises of the Bankrupt, so as to act in the control thereof, as the agent or as a representative of the Bankrupt only.

119 The stipulation of facts herein shows that immediately after the notification of the rejection by the Trustee on November 14th, 1932, that on the very next day, namely, on November 15th, 1932, the Landlord entered into a lease with the Kaufman Hat Company for a term of five years, commencing on January 1st, 1933, and also made a lease with F. C. Maxwell, for a term of one year, to commence immediately, of various portions of the premises. Obviously, the Landlord realized upon the adjudication of the Bankrupt on August 29th, 1932, that the Trustee would not adopt the lease, and accordingly she made prepa-
120 rations for her resumption of control and reletting of the premises immediately upon such formal notification, resulting in the prompt execution of the two leases, as aforesaid.

The Landlord makes no claim that at the time of the execution of these two leases, namely, with the Kaufman Hat Company and with R. C. Maxwell, that she asserted in writing or otherwise, that she was acting in a representative capacity and merely as agent for the Bankrupt. She makes no contention that she made any such assertion at any subsequent time in the various

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other leases which she made for other parts of the demised premises. She does not assert that at any time, either in writing or otherwise, she notified the Bankrupt or any other person, that in reletting of the premises, or in the collecting of rents, or in the operation and control of the premises, that her transactions were merely in a representative capacity only as agent on behalf of the Bankrupt. As a matter of fact, it was only after Section 77B of the Bankruptcy Act had been enacted on June 7th, 1934, followed by the approval of the petition in reorganization of the United herein on June 14th, 1934, that she made her instant claim herein, which she bases upon alleged rights granted to her by this Section.

122

As bearing on the Landlord's present contention, it might be well to note that she filed in the Bankruptcy proceeding, a claim for $1980.99 for alleged expenditures in restoring a party wall and closing up a common entrance in the demised premises, based upon the United's agreement to restore the demised premises *at the expiration of the term.* She received 50% dividends in the Bankruptcy proceeding, and the stipulation herein shows that this claim is also asserted in this Reorganization proceeding. Naturally, the entire basis of this claim for restoration is the expiration of the lease. The Trustee may well point to it, as showing that the Landlord, prior to the enactment of Section 77-B, by her re-entry and reletting of the premises as aforesaid, considered that the lease terminated and expired. It is significant also to note that the lease contained no provision giving the Landlord the right to re-enter for the purpose of reletting for the account of the Tenant.

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Report of Special Master Recommending Disallowance of Claim.

124

All in all, the conclusion is irresistible from the Landlord's entire course of conduct, after the adjudication in bankruptcy herein on August 29th, 1932, that she in fact, regarded the lease terminated, and that she reentered the premises and resumed control thereof solely for her own account. Accordingly, I find that the Landlord did not reenter or relet the premises merely as the agent for the Bankrupt, but she voluntarily terminated the lease and discharged the United from all further liability for rent thereunder.

125

In view of all the foregoing, the Landlord's claim herein, for future rent being without any legal basis on June 14th, 1934 when the United's petition in reorganization was approved, cannot be allowed in this proceeding.

I accordingly recommend that her claim, as aforesaid, should in all respects be disallowed and expunged.

Respectfully submitted,

IRWIN KURTZ,
Special Master.

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Dated, New York, September 18, 1935.

Exceptions of Claimant to Report of Special Master Recommending Disallowance of Claim. 127

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Proceedings for Reorganization of a Corporation.

No. 59,886.

In the Matter of

of 128

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor.

EXCEPTIONS OF CITY BANK FARMERS TRUST COMPANY TO REPORT OF HON. IRWIN KURTZ, SPECIAL MASTER, DATED SEPTEMBER 18, 1935, DISALLOWING AND EXPUNGING CLAIM NO. 5458.

Now comes City Bank Farmers Trust Company (hereinafter called the "Claimant"), and respect- 129
fully excepts to the Report of Hon. Irwin Kurtz, Special Master, dated September 18, 1935, recommending that the claim of City Bank Farmers Trust Company (No. 5458), as assignee of Florence H. Bugbee, should in all respects be disallowed and expunged, and to each and every part of said Report, and to the whole thereof, upon the ground that the same is erroneous in law and in fact, and, without limiting the generality of the foregoing:

Exceptions of Claimant to Report of Special Master Recommending Disallowance of Claim.

130

1. To so much of said Report as determines that the Claimant had no legal claim which would have survived the discharge of the Debtor in the prior bankruptcy proceeding.

2. To so much of said Report as determines that the Claimant had no legal claim against the Debtor after the enactment of Section 77B and the approval of the petition of the Debtor thereunder on June 14, 1934.

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3. To so much of said Report as determines that Section 77B could not and did not create any legal claim against the Debtor where none existed prior to its enactment.

4. To so much of said Report as determines that the landlord, Florence H. Bugbee, realized in November, 1932, that she had no provable claim in bankruptcy for future rent.

5. To so much of said Report as determines that the filing of a claim by Florence H. Bugbee, as landlord, in the bankruptcy proceeding for damages for breach of the covenant to restore indicates that she considered that the lease was terminated prior to the enactment of Section 77B.

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6. To so much of said Report as determines that Florence H. Bugbee, the landlord, regarded the lease as terminated after August 29, 1932, and that she re-entered the premises and resumed control thereof solely for her own account.

7. To so much of said Report as determines that Florence H. Bugbee, the landlord, did not

Exceptions of Claimant to Report of Special Master Recommending Disallowance of Claim.

133

re-enter or relet the premises as agent for the Debtor.

8. To so much of said Report as determines that Florence H. Bugbee, the landlord, voluntarily terminated the lease.

9. To said Report in whole and each and every part thereof, in so far as it fails to determine that Florence H. Bugbee, the landlord, had no intention at any time to relinquish the relation of landlord and tenant existing between her and the Debtor.

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10. To said Report in whole and each and every part thereof for the determination that no order should be made herein determining that the claim filed herein by the Claimant is a valid claim and allowing said claim, but reserving the question of the amount of damages for future determination.

Dated, September 24, 1935.

Respectfully submitted,

135

CITY BANK FARMERS TRUST COMPANY,

By MITCHELL, TAYLOR, CAPRON & MARSH,
Attorneys and Solicitors for Claimant.

Certificate of Special Master to District Court.

136

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In proceedings for reorganization of a corporation No. 59,886.

Claim No. 5458.

In the Matter

of

137 UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

To the Honorable Judges of the United States District Court, Southern District of New York:

I, IRWIN KURTZ, Special Master herein, make the following report:

1. On September 18th, 1935 I recommended the disallowance of the claim of the City Bank
138 Farmers Trust Company, Assignee of Florence H. Bugbee, Landlord, for damages of an alleged breach of the lease upon a rejection thereof on November 14th, 1932 by the Irving Trust Company as Trustee in the prior Bankruptcy proceeding. I based my recommendation and my Report on the fact that the lease was terminated by the Landlord by her reentry and reletting of the premises on November 15th, 1932 which resulted in a termination of the liability of the Tenant as a matter of law and also by reason of the agreement of the parties, in that the lease

contained no covenant of indemnity or other pro- 139
vision for the continued liability after such termination; that therefore, the Landlord having no legal valid claim, that Section 77-B could not and did not create any legal claim against the Debtor which had not existed prior to its enactment.

2. On September 25th, 1935 the Claimant feeling aggrieved thereat, filed exceptions to the said Report.

3. The errors complained of in brief are—the 140
findings, as aforesaid, as to the termination of the lease by the Landlord, and the consequential termination of all liability of the Tenant by reason of which Claimant not having any legal valid claim heretofore, that none was created thereafter by the enactment of Section 77-B.

4. The respective contentions of the parties, as well as the legal question involved herein, are fully set forth in the said Report dated September 18th, 1935, to which this Court is respectfully referred.

5. I hand up herewith the following: 141

(a) Exceptions.

(b) Special Master's Report.

(c) Application to expunge.

(d) Stenographic minutes and exhibits.

Dated, New York, September 26, 1935.

IRWIN KURTZ,
Special Master.

Certificate of Special Master to District Court.

142 This Certificate will be placed on the Bankruptcy Motion Calendar in the District Court, on Wednesday October 2nd, 1935 at 10:30 A. M.

Notice thereof by mail given to:

CRAVATH, DEGERSDORFF, SWAINE & WOOD, Attorneys for Trustee, 15 Broad Street, New York City.

MITCHELL, TAYLOR, CARBON & MARSH, Attorneys for Claimant, 20 Exchange Place, New York City.

143

ROSENBERG, GOLDMARK & COLIN, Attorneys for Debtor, 165 Broadway, New York City.

M. CARL LEVINE, Attorney for Jacob Ruppert Realty Corporation, 535 Fifth Avenue, New York City.

RALPH MONTGOMERY ARKUSH, Attorney for Landlords Protective Committee, 15 Broad Street, New York City.

SHEARMAN & STERLING, Attorneys for Preferred
144 Stockholders Protective Committee, 55 Wall Street, New York City.

BERLE & BERLE, Attorneys for Preferred Stockholders Protective Committee, 70 Pine Street, New York City.

DAVIS, POLK, WARDWELL, GARDINER & REED, Attorneys for Debenture Holders Protective Committee, 15 Broad Street, New York City.

SULLIVAN & CROMWELL, Attorneys for United Stores Corporation and for Debtor in State Court actions, 48 Wall Street, New York City.

Opinion of Judge Hulbert Confirming Report of Special Master. 145

#370

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

#59,886.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA, Debtor. 146

OPINION.

HULBERT, *D. J.*:

The United Cigar Stores of America was the lessee of premises in Trenton, New Jersey, under a lease from Claimant's assignor to expire on March 31, 1946, and had paid the rent due under said lease up to August 31, 1932.

On August 29, 1932, the lessee was adjudicated a bankrupt. 147

The premises at that time were in the possession of several sub-tenants.

On November 14, 1932, the Irving Trust Company, as Trustee in Bankruptcy, notified the landlord of its intention to reject the lease and the landlord thereafter relet various portions of the premises to or accepted attornments from the sub-tenants and subsequently relet various portions to new tenants.

There is nothing in the lease to indicate that any liability of the tenant was to survive reentry

118 and reletting by the landlord, or to authorize the landlord to relet as agent for the tenant, and no notice was given by the landlord to the bankrupt or the Trustee of any intention to relet the premises for the benefit of the bankrupt, or of any reletting which took place, nor did the landlord indicate in any way that she was reletting as agent for the bankrupt and that she intended to treat the bankrupt's liability under the lease as continuing until October 10, 1934, when a proof of claim was filed in the pending proceedings.

149 On or about June 9, 1934, the bankrupt filed a petition under Section 77B, and on June 14, 1934, this Court made an order approving said petition.

The landlord assigned her claim to City Bank Farmers Trust Company, agent for the Landlords' Protective Committee, on September 22, 1934, and claimant filed a proof of claim against the debtor herein for damages resulting from the rejection of the lease by the Trustee in Bankruptcy.

The Referee to whom the claim and the objections thereto were referred as Special Master, filed a report recommending that the claim be expunged and the matter comes on for review upon

150 petition of the claimant.

The Referee determined that the reentry of the landlord under the lease and her subsequent acts, terminated the liability on the part of the tenant under the lease. After a careful review of the record and examination of the briefs submitted, I concur in that determination.

I cannot perceive how Congress could, and there is nothing in Section 77B that expresses an intention to, revive an extinct claim.

If, at the time of the filing of a petition under Section 77B the statutory period for filing claims

Notice of Entry of Order of District Court Confirming Report of Special Master.

151

in a prior pending bankruptcy proceeding had not expired, but after the expiration of that time a claim were filed in the reorganization proceeding pursuant to notice to file claims in that proceeding, a debatable question might be presented, but the time to file in the original bankruptcy proceedings against United Cigar Stores had expired March 1, 1933, more than 16 months before the petition in these proceedings was filed and approved.

Petition denied and report of Referee confirmed.

Dated, N. Y., October 31, 1935. 152

HULBERT,
U. S. D. J.

Notice of Entry of Order of District Court Confirming Report of Special Master.

UNITED STATES DISTRICT COURT.
SOUTHERN DISTRICT OF NEW YORK.

In Proceedings for Reorganization
of a Corporation. 153

No. 59886.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

Sirs:

PLEASE TAKE NOTICE that the within is a true copy of an order made and entered herein by the

Notice of Entry of Order of District Court Confirming Report of Special Master.

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Honorable Murray Hulbert, United States District Judge, on November 6, 1935, and filed in the office of the Clerk of the Court on November 8, 1935.

Dated, November 12, 1935.

CRAVATH, DE GERSDORFF,
SWAINE & WOOD,
Attorneys and Solicitors for Irving
Trust Company, Trustee of the Es-
tate of United Cigar Stores Com-
155 pany of America, Debtor,
Office & Post Office Address,
No. 15 Broad Street,
Borough of Manhattan,
New York, N. Y.

To:

MESSRS. MITCHELL, TAYLOR, CAPRON & MARSH,
Attorneys for City Bank Farmers
Trust Company, Assignee of
Mrs. Florence H. Bugbee,
20 Exchange Place,
156 New York, N. Y.

MESSRS. SHEARMAN & STERLING,
55 Wall Street,
New York, N. Y.

and

MESSRS. BERLE & BERLE,
70 Pine Street,
New York, N. Y.

Attorneys for Preferred Stockholders
Protective Committee.

Order of District Court Confirming Report of Special Master.

At a Special Term for Bankruptcy Motions of the United States District Court in and for the Southern District of New York, at the Court House thereof in the Borough of Manhattan, City and Southern District of New York, on the 6th day of November, 1935.

Present—HONORABLE MURRAY HULBERT,
United States District Judge.

In Proceedings for Reorganization of a Corporation.

No. 59886.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA, a New Jersey Corporation,

Debtor.

On reading and filing the report, dated September 18, 1935, of Honorable Irwin Kurtz, Special Master, recommending that the claim filed herein by City Bank Farmers Trust Company, as assignee of Mrs. Florence H. Bugbee be disallowed, the exceptions to said report dated September 25, 1935, and filed herein on behalf of said claimant, the certificate of the Special Master, dated September 26, 1935, certifying to this Court the questions presented by such exceptions, and upon

Order of District Court Confirming Report of Special Master.

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the other documents and papers referred to in said report and certificate, and after hearing Messrs. Cravath, de Gersdorff, Swaine & Wood, attorneys and solicitors for Irving Trust Company, Trustee of the Estate of the above-named Debtor, by R. L. Gilpatric, Esq., of counsel, in support of the Special Master's report and Messrs. Mitchell, Taylor, Capron & Marsh, attorneys for said claimant, by Henry L. Glenn, Esq., of counsel, in opposition thereto, and after due consideration, it is, on motion of counsel for said Trustee,

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ORDERED that the report of Honorable Irwin Kurtz, Special Master, dated September 18, 1935, recommending that the claim of City Bank Farmers Trust Company, assignee of Mrs. Florence H. Bugbee, be expunged, be and the same is hereby approved and confirmed, that the exceptions filed to said report be and they hereby are overruled and denied and that said claim be and it hereby is disallowed and expunged.

HULBERT,
U. S. D. J.

162

Petition for Appeal and Order Allowing Appeal.

163

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Proceedings for Reorganization of a corporation. No. 59,886.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor. 164

To the Honorable the Judges of the District Court of the United States, Southern District of New York:

The petitioner, City Bank Farmers Trust Company, as assignee of Florence H. Bugbee, a former landlord of United Cigar Stores Company of America, the Debtor in the above-entitled proceedings, feeling itself aggrieved for the reasons set forth in the assignment of errors hereto annexed and filed herewith, by the order of this 165
Court made and entered herein on or about November 6, 1935, approving and confirming the report of Hon. Irwin Kurtz, Special Master, dated September 18, 1935, recommending that the claim of City Bank Farmers Trust Company, as assignee of Florence H. Bugbee, be expunged, and disallowing and expunging said claim, hereby appeals therefrom to the United States Circuit Court of Appeals for the Second Circuit, and prays that leave be granted to it to appeal from said order of this Court to said United States

166 Circuit Court of Appeals, and that a citation issue as provided by law, directed to all the parties to the above-entitled proceedings, commanding them to appear before said United States Circuit Court of Appeals to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record upon which said order of November 6, 1935, was based, and of all proceedings relating to said claim, duly authenticated, be transmitted to said United States Circuit Court of Appeals, and that a proper order relating to the security to be required of the appellant be made, and for such
167 other and further relief as to this Court may seem just and proper in the premises.

Dated, New York, N. Y., December 2, 1935.

CITY BANK FARMERS TRUST COMPANY,
By MITCHELL, TAYLOR, CAPRON & MARSH,
Its Attorneys and Solicitors.

MITCHELL, TAYLOR, CAPRON & MARSH,
Attorneys and Solicitors for
City Bank Farmers Trust
168 Company, as aforesaid,
Office and Post Office Address,
No. 20 Exchange Place,
New York, N. Y.

Petition for Appeal and Order Allowing Appeal.

United States of America,
Southern District of New York,
County of New York, 169
State of New York—ss.:

HENRY L. GLENN, being duly sworn, deposes and says: That he is associated with the firm of Mitchell, Taylor, Capron & Marsh, attorneys and solicitors for City Bank Farmers Trust Company, the petitioner named in the foregoing petition; that he has read the said petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, he believes it to be true. 170

HENRY L. GLENN.

Sworn to before me this
5th day of December, 1935.

JOHN T. COLLINS,
Notary Public,
Queens County.
Queens Co. Clk's No. 3108, Reg. No. 7413.
N. Y. Co. Clk's No. 903, Reg. No. 7 C 556.
Commission Expires March 30, 1937.

ORDERED, that leave to appeal as prayed for in the foregoing petition be allowed, and that 171 a certified transcript of the record on which the order appealed from is based and of all proceedings relating to the claim described in said petition be transmitted to the Circuit Court of Appeals for the Second Circuit; and it is further

ORDERED, that a bond for costs on appeal be fixed in the sum of $250.

Dated, December 5th, 1935.

HENRY W. GODDARD,
United States District Judge for the
Southern District of New York.

Assignment of Errors.

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DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

In Proceedings for Reorganization of a Corporation.—No. 59,886.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor.

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Now comes City Bank Farmers Trust Company, as assignee of Florence H. Bugbee, a landlord-creditor in the above-entitled proceedings, and files the following assignment of errors upon which it will rely upon prosecution of the appeal in the above-entitled proceedings from the order of the United States District Court for the Southern District of New York made and entered on or about November 6, 1935, and says that said order dated November 6, 1935, was and is erroneous in law and in fact in that it affirms

174 and approves the report of Hon. Irwin Kurtz, Special Master, dated September 18, 1935, recommending that the claim of City Bank Farmers Trust Company, as assignee of Florence H. Bugbee, be expunged, and disallowing and expunging such claim, and, without limiting the generality of the foregoing, in that it affirms and approves:

1. So much of said report as determines that City Bank Farmers Trust Company (hereinafter sometimes called the "Claimant"), as assignee as aforesaid, had no legal claim which would have

survived the discharge of the Debtor in the bankruptcy proceeding preceding the above-entitled reorganization proceedings. 175

2. So much of said report as determines that the Claimant had no legal claim against the Debtor after the enactment of Section 77B, and the approval of the petition of the Debtor herein on June 14, 1934.

3. So much of said report as determines that Section 77B could not and did not create any legal claim against the Debtor where none existed prior to its enactment, as applied to the facts of this case. 176

4. So much of said report as determines that the landlord, Florence H. Bugbee, realized in November, 1932, that she had no provable claim in bankruptcy for future rent.

5. So much of said report as determines that the filing of a claim by Florence H. Bugbee, the landlord, in said prior bankruptcy proceeding for damages for breach of the covenant to restore indicates that she considered that the lease was terminated prior to the enactment of Section 77B. 177

6. So much of said report as determines that Florence H. Bugbee, the landlord, regarded the lease as terminated after August 29, 1932, and that she re-entered the premises and resumed control thereof solely for her own account.

7. So much of said report as determines that Florence H. Bugbee, the landlord, did not re-enter or relet the premises as agent for the Debtor.

178 8. So much of said report as determines that Florence H. Bugbee, the landlord, voluntarily terminated the lease.

The court also erred in that it did not disaffirm the whole of said report and did not determine the claim of the Claimant to be a valid claim provable and allowable under Section 77B, reserving the question of the amount of damages for future determination; and in that the court did not hold that under the law of New Jersey the Debtor was not relieved under the facts and circumstances set forth in the stipulation of facts
179 made by the parties herein from its obligations under the lease by reletting; and in that the court did not hold that, whether or not the Debtor was so relieved from its obligations under the lease under the New Jersey law by said reletting, the claim of the Claimant is provable and allowable herein under Section 77B, reserving the question of the amount of damages for future determination.

The court also erred in law and in fact in failing to determine that Florence H. Bugbee, the landlord, had no intention at any time to relin-
180 quish the relation of landlord and tenant existing between her and the Debtor.

The court also erred in holding that the provability and allowability of the claim of the Claimants herein was dependent upon the fact that the time for the filing of claims in the bankruptcy proceeding which was pending prior to the institution of the above-entitled proceeding under Section 77B had expired prior to the filing of the petition herein.

WHEREFORE, the Claimant prays that said order of November 6, 1935, be reversed and that the

Admission of Service of Copy of Citation and Bond on Appeal.

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aforesaid claim be determined to be provable and allowable herein in such amount as may be hereafter established by the Claimant at a hearing to be held before the Special Master for such purpose.

Dated, December 2, 1935.

MITCHELL, TAYLOR, CAPRON & MARSH,
Attorneys and Solicitors for
City Bank Farmers Trust
Company, as assignee of Flor-
ence H. Bugbee,
Office and Post Office Address,
No. 20 Exchange Place,
Borough of Manhattan,
New York, N. Y.

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Admission of Service of Copy of Citation and Bond on Appeal.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

183

In the Matter
of
UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

Service of a copy of the Citation and Bond on Appeal in the above entitled proceeding with

Admission of Service of Copy of Citation and Bond on Appeal.

184 notice of filing is hereby admitted this 6th day of December, 1935.

Copy received December 6, 1935.

ROSENBERG, GOLDMARK & COLIN,
Attorneys for Debtor.

CRAVATH, DEGERSDORFF, SWAINE & WOOD,
Attorneys for Irving Trust Company, Trustee for the Estate of United
185 Cigar Stores Company of America.

BERLE & BERLE
and
SHEARMAN & STERLING,
Attorneys for Stockholders' Protective Committee.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for Debentureholders' Protective Committee.

186 Copy received December 6, 1935.

SULLIVAN & CROMWELL,
Attorneys for United Stores Corporation.

M. CARL LEVINE,
Attorney for Jacob Ruppert Realty Corp.

MILBANK, TWEED, HOPE & WEBB,
Attorneys for Phoenix Securities Corp.

Citation.

By the Honorable Henry W. Goddard, one of the United States District Court Judges for the Southern District of New York, in the Second Circuit, to Irving Trust Company, as trustee of the estate of United Cigar Stores Company of America, Debtor, United Stores Company of America, United Cigar Stores Company of America, Jacob Ruppert Realty Corporation, Grayson M-P. Murphy, G. W. Baker, William de Krafft and Benjamin Graham, as a Preferred Stockholders' Protective Committee, Lewis L. Strauss, Burnett Walker and Maurice Wertheim, as a Debentureholders' Protective Committee, and Peter Grimm, Stewart C. Pratt and W. Howard Wright, as a Landlords' Protective Committee, Phoenix Securities Corporation, GREETING:

YOU ARE HEREBY CITED and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named on the 4th day of January, 1936, pursuant to a petition for appeal and an order filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, allowing such petition for appeal in "In the Matter of United Cigar Stores Company of America, Debtor (In proceedings for reorganization of a corporation, No. 59,886)," wherein City Bank Farmers Trust Company, as assignee of Florence H. Bugbee, is the appellant and you are appellees, to show cause, if any there be, why the order of this Court in said petition mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

190 GIVEN UNDER MY HAND at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 5th day of December, in the year of our Lord one thousand nine hundred and thirty-five and of the Independence of the United States the one hundred and sixtieth.

HENRY W. GODDARD,
United States Judge for the Southern District of New York in the Second Circuit.

C.W.

191

192

Bond for Costs on Appeal.

193

(Emblem)

MASSACHUSETTS BONDING AND INSURANCE COMPANY
Home Office, Boston, Massachusetts

DISTRICT COURT OF THE UNITED STATES OF AMERICA,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE SECOND CIRCUIT.

In Proceedings for Reorganization of a Corporation. 194
No. 59,886.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

The Petitioner, City Bank Farmers Trust Company, as assignee of Florence H. Bugbee, a 195
former landlord of United Cigar Stores Company of America, the Debtor.

KNOW ALL MEN BY THESE PRESENTS, That Massachusetts Bonding and Insurance Company, a corporation organized under the laws of the Commonwealth of Massachusetts, authorized to transact business in the State of New York, having an office and place of business at 130 William Street, Borough of Manhattan, City of New York, is held and firmly bound unto Irving Trust Company, as

196 Trustee of the Estate of United Cigar Stores Company of America, Debtor, United Stores Company of America, United Cigar Stores Company of America, Jacob Ruppert Realty Corporation, Grayson M-P. Murphy, G. W. Baker, William deKrafft and Benjamin Graham, as a Preferred Stockholders' Protectjve Committe, Lewis L. Strauss, Burnett Walker and Maurice Wertheim, as a Debentureholders' Protective Committee, and Peter Grimm, Stewart C. Pratt and W. Howard Wright, as a Landlords' Protective Committee, Phoenix Securities Corporation, in the sum of Two hun-
197 dred fifty and 00/100 ($250.00) Dollars, to be paid to the said Irving Trust Company, as Trustee of the Estate of United Cigar Stores Company of America, Debtor, United Stores Company of America, United Cigar Stores Company of America, Jacob Ruppert Realty Corporation, Grayson M-P. Murphy, G. W. Baker, William deKrafft and Benjamin Graham, as a Preferred Stockholders' Protective Committee, Lewis L. Strauss, Burnett Walker and Maurice Wertheim, as a Debentureholders' Protective Committee, and Peter Grimm, Stewart C. Pratt and W. Howard Wright, as a Landlords' Protective Committee, Phoenix
198 Securities Corporation, for the payment of which, well and truly to be made, the said Massachusetts Bonding and Insurance Company binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with its seal and dated this 5th day of December, in the year of our Lord One Thousand Nine Hundred and Thirty-five.

WHEREAS, CITY BANK FARMERS TRUST COMPANY, as assignee of Florence H. Bugbee, a former

landlord of United Cigar Stores Company of America, the Debtor, has prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit, to reverse the order dated the 6th day of November, 1935, rendered in the above entitled suit, in the District Court of the United States for the Southern District of New York. 199

NOW, THEREFORE, the condition of this obligation is such, that if the above named City Bank Farmers Trust Company, as assignee of Florence H. Bugbee, a former landlord of United Cigar Stores Company of America, the Debtor, shall prosecute said appeal to effect, and answer all damages and costs if it fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue. 200

MASSACHUSETTS BONDING AND
INSURANCE COMPANY,
By W. C. BILLINGS,
Attorney-in-Fact.

Attest GARRETT B. CARMAN,
Attorney-in-Fact. 201

(Verification, etc.)

Approved 12/6/35.

H. W. GODDARD,
U. S. D. J.

Filed 12/6/35.

Stipulation as to Record.

UNITED STATES DISTRICT COURT,

202 SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

UNITED CIGAR STORES COMPANY of AMERICA,
Debtor.

CITY BANK FARMERS TRUST COMPANY, assignee of Florence H. Bugbee,
Appellant,

IRVING TRUST COMPANY, as trustee of the estate of the above-named Debtor, et al.,
203 Appellees.

IT IS HEREBY STIPULATED AND AGREED, that the foregoing is a true transcript of the record of the United States District Court for the Southern District of New York in the above-entitled matter as agreed on by the parties, and that the Clerk of said Court may certify the same as correct.

Dated, January 13th, 1936.

MITCHELL, TAYLOR, CAPRON & MARSH,
204 Attorneys for Claimant, City Bank Farmers Trust Company.

CRAVATH, DEGERSDORFF, SWAINE & WOOD,
Attorneys for Irving Trust Company, as trustee.

BERLE & BERLE
and

SHEARMAN & STERLING,
Attorneys for Stockholders' Protective Committee.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for Debentureholders' Protective Committee. 205

M. CARL LEVINE,
Attorney for Jacob Ruppert Realty Corporation.

MILBANK, TWEED, HOPE & WEBB,
Attorneys for Phoenix Securities Corporation.

MITCHELL, TAYLOR, CAPRON & MARSH,
Attorneys for Landlords' Protective Committee. 206

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Clerk's Certificate.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

UNITED CIGAR STORES COMPANY of AMERICA,
Debtor.

CITY BANK FARMERS TRUST COMPANY, assignee of Florence H. Bugbee,

209 Appellant,

IRVING TRUST COMPANY, as trustee of the estate of the above-named Debtor,

Appellee.

I, CHARLES WEISER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby CERTIFY that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed upon by the parties.

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IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 14th day of January, in the year of our Lord one thousand nine hundred and thirty-six, and of the Independence of the said United States the one hundred and sixty-first.

CHARLES WEISER,
Clerk.

(Seal)

[fol. 71] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1935

Argued March 4, 1936. Decided April 6, 1936

No. 312

In the Matter of

UNITED CIGAR STORES COMPANY OF AMERICA, Debtor

CITY BANK FARMERS TRUST COMPANY, Assignee of Florence H. Bugbee, Appellant

IRVING TRUST COMPANY, as Trustee of the Estate of the Above-Named Debtor, et al., Appellees

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, Augustus N. Hand, and Chase, Circuit Judges

Appeal from an order of the District Court for the Southern District of New York in reorganization proceedings under section 77B of the Bankruptcy Act (11 U. S. C. A. § 207) disallowing and expunging a landlord's claim for damages and loss of rent because of the rejection of a lease by a trustee in the bankruptcy proceedings of the debtor pending prior to the filing of the petition herein.

Mitchell, Taylor, Capron & Marsh, of New York City (Rollin Browne and Henry L. Glenn, both of New York City, of counsel), for claimant-appellant.

Cravath, de Gersdorff, Swaine & Wood, of New York City (Wm. D. Whit-, Donald C. Swatland, R. L. Gilpatric, and B. R. Shute, all of New York City, of counsel), for the reorganization trustee.

Shearman & Sterling and Berle & Berle, all of New York City (Sanford H. E. Freund, Winthrop H. Kellogg, and Douglas B. Steimle, all of New York City, of counsel), for appellees herein Preferred Stockholders' Protective Committee.

John Gerdes and John Godfrey Saxe, both of New York City, and Edward B. Lucius, of Chicago, Ill., amici curiæ.

CHASE, Circuit Judge:

The appellant is the assignee of a claim by a landlord who owned premises in Trenton, N. J., which were leased to the debtor for a term of twenty years beginning April 1, 1926. The debtor occupied no part of the leased premises itself, but sublet them as of right it might under the lease. On August 29, 1932, the debtor filed a voluntary petition in bankruptcy and was then adjudicated a bankrupt. At that time its rent had been paid in full. Its duly qualified trustee found the lease burdensome and rejected it, pursuant to an order obtained for that purpose, on November 11, 1932, paying over to the landlord all rents it had in the meantime collected.

The landlord re-entered without notice in accordance with such a right reserved in the lease, and made structural [fol. 72] changes in the premises to restore them to the condition they were in when leased by rebuilding a party wall and closing up a common entrance, all at an expense of $1,980.99. The lease provided that, at termination, all improvements made by the lessee should belong to and become the property of the lessor, but there was no provision that, upon termination before the expiration of the term and reentry by the landlord, the premises might be relet for the lessee's account and that the lessee should be liable for any deficiency. The landlord did relet without notice to the lessee.

The issue is whether the landlord has a claim for damages because of injury occasioned by the rejection of the lease by the trustee in the prior bankruptcy proceeding.

Whether such a claim is allowable under section 77B (b) (10), 11 U. S. C. A. § 207 (b) (10), depends upon whether, under the applicable state law, it is capable of proof on the merits. See In re United Cigar Stores Co. of America (Otis), — F. (2d) — (C. C. A.); In re United Cigar Stores Co. of America (Meadows), — F. (2d) — (C. C. A.)—both decided today. Section 77B makes such a claim provable provided there is evidence in support of it which constitutes proof as a matter of law. So there is no barrier confronting the appellant on the ground of provability because the proceeding in which the attempt to prove is made is a proceeding in bankruptcy under section 77B.

But whether the order should be affirmed depends not alone upon that. It was necessary for the appellant to

prove recoverable damages as a result of the rejection. When the trustee in bankruptcy rejected the lease, such rights to rent under subleases as the lessee had originally reverted to the bankrupt subject to the lessor's equitable lien upon them to secure the payment of rent under the main lease. In re United Cigar Stores Co. of America (Reisenweber's, Inc., v. Irving Trust Co.), 69 F. (2d) 513 (C. C. A.). When, however, the landlord re-entered, as it did at once, under a re-entry clause all rights of the lessee came to an end. Ordinarily such re-entry, in the absence of a covenant for continuing liability for rent, also cuts off all liability of the lessee for future rent. In re Sherwoods, Inc. (C .C. A.) 210 F. 754, Ann. Cas. 1916A, 940. When the landlord accepts surrender of the premises, he cannot have possession and use and still collect any part of the rent reserved in a lease which no longer confers any rights in the premises upon the lessee unless the lease contains a covenant to that effect. We do not find that the law of New Jersey is different in principle from the general rule in this respect. Only in the proof of surrender to, and acceptance by, the landlord does there seem to be a distinction. Apparently proof that a lease was rejected by a receiver in bankruptcy of the lessee, that the lessor re-entered and relet without notice to the lessee of acceptance of surrender or of an intention to relet for the lessee's account, is not sufficient as a matter of law to show a surrender and acceptance of the leased premises. Liskovsky v. Blau, 114 N. J. Law, 324, 176 A. 562. See, also, Dolton v. Sickel, 66 N. J. Law, 492, 49 A. 679; Banks v. Berliner, 95 N. J. Law, 267, 113 A. 321. But here the evidence went beyond that and showed that the landlord had made substantial changes in the premises indicative of the resumption of dominion over them inconsistent with the continuing status of landlord and tenant under the lease. These acts together show such an unequivocal breaking off of the relationship which before existed under the lease that the landlord must be held to have accepted a surrender of the premises as a matter of law in consequence of what was done. Sypherd v. Myers, 80 N. J. Law, 321, 79 A. 340; Fink v. Browe Co. (N. J. Ch.) 99 A. 926. Hence the necessary proof of surrender and acceptance which ended this debtor's liability for future rent under the lease made it impossible to show on the merits that the appellant's assignor sustained any damages from injury by the rejection of the

lease. It therefore has no claim susceptible of proof as a matter of law. Section 77B did not create — rights to form the basis of claims but only enlarged the remedy to make some valid claims provable in proceedings under section 77B which were not before provable in bankruptcy. See In re United Cigar Stores Co. of America (Otis), supra, and In re United Cigar Stores Co. of America (Meadows), supra.

Order affirmed.

[fol. 73] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the 13th day of April, one thousand nine hundred and thirty-six.

Present: Hon. Martin T. Manton, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

In the Matter of UNITED CIGAR STORES COMPANY OF AMERICA, DEBTOR

CITY BANK FARMERS TRUST COMPANY, as Assignee, etc., Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 74] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re United Cigar Stores Company of America (City Bank). Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed April 13, 1936. William Parkin, Clerk.

[fol. 75] [Stamp:] United States Circuit Court of Appeals, Second Circuit, Filed Apr. 14, 1936. William Parkin, Clerk

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of

UNITED CIGAR STORES COMPANY OF AMERICA, Debtor

CITY BANK FARMERS TRUST COMPANY, Assignee of Florence H. Bugbee, Appellant

IRVING TRUST COMPANY, as Trustee of the Estate of the Above-named Debtor, et al., Appellees

On Appeal from the United States District Court for the Southern District of New York

PETITION FOR REHEARING

To the United States Circuit Court of Appeals for the Second Circuit and the Judges Thereof:

Comes now City Bank Farmers Trust Company, assignee of Florence H. Bugbee, the appellant herein, and presents this its petition for a rehearing and in support thereof respectfully shows:

The decision of this Court is wrong on the facts and on the law, in that

(1) it has imported into the case an issue not presented by the record and therefore not argued by appellant;

(2) it has considered as determinative of such issue a fact which is not contained in the stipulation of facts on [fol. 76] which the case was submitted and which opposing counsel expressly conceded to be unsupported by any evidence in the record; and

(3) it has applied an erroneous rule of law to such fact.

The Special Master found that a surrender of the lease was effected by the landlord re-entering and reletting the

premises without notice to the tenant. The District Court confirmed the report, over appellant's exceptions (fols. 129, 132).

This Court held that the re-entry and reletting did not effect a surrender, but affirmed the decision on the ground that a surrender had occurred because of the acts of the landlord in making changes or alterations in the demised premises after the tenant's abandonment. This Court stated:

"The landlord re-entered without notice in accordance with such a right reserved in the lease, and made structural changes in the premises to restore them to the condition they were in when leased, by rebuilding a party wall and closing up a common entrance, all at an expense of $1980.99."

"But here the evidence went beyond that [re-entry and reletting] and showed that the landlord had made substantial changes in the premises indicative of the resumption of dominion over them inconsistent with the continuing status of landlord and tenant under the lease."

The alleged fact upon which this Court's decision was thus based is entirely unsupported by the evidence. Counsel for the Trustee stated on the argument that the land-[fol. 77] lord had made substantial alterations in the premises, but, upon our objecting to his statement, he subsequently conceded expressly that the alleged fact did not appear in the record.

The case was submitted to the Special Master on two written stipulations of fact, which constituted the only evidence in the case (fol. 54). These stipulations (fols. 55 and 97) contain no reference whatever to any alterations, changes, improvements, repairs or restorations to the premises having been made at any time by the landlord or by the tenant.

The Trustee's sole objection to the claim (fol. 41), was as follows:

"The Trustee is advised that said landlord re-entered the leased premises in November, 1932, and relet the same to other tenants and *thereby* worked a forfeiture of the lease, terminating all future obligations of the Debtor thereunder." (Italics supplied.)

The claim was thus submitted to the Special Master on the issue raised by such objection and on the evidence contained in the stipulations, which obviously were drawn with an eye to the only issue presented.

To support his conclusion that the landlord, by re-entering and reletting, had intended to accept a surrender rather than to relet for the account of the tenant, the Special Master, sua sponte, made the following statement (fol. 122):

"As bearing on the Landlord's present contention [that her reentry and reletting did not effect a surrender] it might be well to note that she filed in the Bankruptcy proceeding, a claim for $1980.00 for alleged expenditures in **restoring** a party wall and closing up a common entrance [fol. 78] in the demised premises, based upon the United's agreement to **restore** the demised premises *at the expiration of the term.* She received 50% dividends in the bankruptcy proceeding and the stipulation herein shows that this claim is also asserted in this Reorganization proceeding. Naturally, the entire basis of this claim for restoration is the expiration of the lease. The trustee may well point to it, [although the Trustee, for reasons best known to itself, had not pointed to it] as showing that the landlord, prior to the enactment of Section 7B **by her re-entry and reletting** of the premises, as aforesaid, considered that the lease terminated and expired." (Blackface and matter in brackets, but not italics, supplied.)

This Court must have assumed, from the above-quoted remarks of the Special Master, that there was evidence showing the restoration of the premises. Not only was such assumption wrong, but there was not anything in the stipulations to show that a claim had been filed in the bankruptcy proceeding for the cost of any such restoration, thus showing that these matters were not considered within the issue.

(A) The Court has misapprehended the effect under the New Jersey law of the landlord's restoration of premises to their original condition.

Although the facts are not in the record, the inferences which legitimately may be drawn from this Court's finding are as follows:

The tenant of the demised building, who also occupied the adjoining building, tore out the dividing wall in order to make one large combined space and cut a common en- [fol. 79] trance on the line of the old wall. The tenant defaulted and abandoned, whereupon the landlord had the right to resume possession and relet for the tenant's account. When the landlord re-entered for that purpose, she found a partially demolished building, and she rebuilt the wall and closed up the common entrance in order to restore the building and make it possible for her to relet.

The Court cited two cases in support of its conclusion—Sypherd v. Myers, 79 Atl. 340 and Fink v. Browe, 99 Atl. 926. In the Sypherd case it did not appear that any repairs or alterations whatever had been made; the Fink case merely held that "making changes and alterations therein that were not necessary as repairs for the preservation of the building", among other acts on the part of the landlord, indicated an intention on the landlord's part to accept a surrender. But it has never been held in New Jersey, nor elsewhere, so far as we know, that the making by the landlord of repairs or alterations merely necessary to restore the premises to the condition in which they existed at the commencement of the term is indicative of an acceptance of a surrender.

In Meeker v. Spalsbury, 66 N. J. L. 60, where a surrender was found, the landlord remodelled the building, which had been leased as a hotel, so that it could be used as either a hotel or for flats. When the work was begun the premises were already in good condition and repair.

That mere restoration of premises to their original condition does not effect a surrender is settled by the case of Zabriskie v. Sullivan, 80 N. J. L. 673, aff'd 82 N. J. L. 545, in which the alterations made by the landlord were apparently those necessary to restore the premises to their original condition, the lease containing a covenant by the [fol. 80] tenant to surrender the premises in good condition at the expiration of the term, but no covenant to repair.* The Supreme Court said (at p. 676):

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*The lease in the instant case contains both covenants (fol. 81).

"The reparation of the premises by the landlord was also for the benefit of the tenant, for it relieved him of his duty to repair and increased the likelihood of securing a tenant."

See also Liskovsky v. Blau, 114 N. J. L. 324, and Banks v. Berliner, 95 N. J. L. 267, applying the same rule to necessary repairs.**

The rule is clearly stated by Schnebly, Operative Facts in Surrenders, 22 Ill. L. Rev. 117, 129.

"Another question which arises is whether or not a surrender results from the fact that the lessor has made repairs before reletting. The making of necessary repairs ought not to be regarded as indicating any particular intention. It is well known that repairs must usually be made when there is a change of tenants; that new tenants will usually demand more than tenants who are settled on the premises. The old lessee is benefited by the making of such repairs if the result is to secure a new tenant more quickly, or to obtain a higher rental than would otherwise be realized. Such repairs do not, therefore, cause a surrender. Where expensive and unnecessary repairs have been made, the question is more serious. Such action on the part of the landlord may make it appear that he has taken advan- [fol. 81] tage of the tenant's default to eliminate him entirely, and to make the premises a source of greater profit to himself. Moreover, the making of extensive alterations means that the premises must stand idle while these alterations are being effected, and that the loss to the tenant may be aggravated."

In the instant case, the loss to the landlord was not aggravated by the work done by the landlord. On the contrary, by making the premises rentable, the debtor's damages were mitigated. Nor can any inference be drawn from the Special Master's report that the repairs were not necessary for the protection and preservation of the property. The legitimate inference is all the other way.

**The rule in other states is the same: Trick v. Eckhouse, 145 N. E. 587 (restoration of hole in outside wall); Hickman v. Breadford, 179 Iowa 827; Breuckman v. Twibill, 89 Pa. St. 58; Gerhart Realty Co. v. Brecht, 109 Mo. App. 25; Higgins v. Street, 19 Okla. 45, Cf. Siller v. Dunn, 284 Pac. 232 (furniture store altered into a hotel).

The tenant's alterations had seriously damaged the building (cf. Kinney Realty Company v. Salmon, 106 N. J. Eq. 389; Agate v. Lowenbein, 57 N. Y. 604; Woolworth v. Nelson, 85 So. 449 (Ala.)); the landlord merely repaired or restored the damage.

A holding that making repairs necessary to restore premises to their original condition effects a surrender would nullify the New Jersey rule that a landlord may relet for the tenant's account, since the privilege is worthless unless the landlord may put the premises in rentable condition. In the case at bar it was obviously essential, in order to relet, to close up the common entrance and replace the party wall, for the building was not rentable except as an independent unit.

(B) A further hearing on the merits of the claim should not be required.

The claim was submitted to the Special Master on the one narrow issue as to whether a surrender had been effected [fol. 82] by re-entry and reletting, and on an agreed statement of the facts deemed relevant to that issue. No question was submitted to him as to whether a surrender had been effected by the repair, restoration or alteration of the premises, and no facts relating to any such question were included in the stipulations.

The Special Master, therefore, erred in basing any conclusion upon the fact that the landlord had filed a claim in the prior bankruptcy proceedings for the cost of restoring alterations made by the tenant. His report is entitled to no more weight than the stipulated facts justify.

In re Pittsburgh-Big Muddy Coal Co., 215 Fed. 703, 706;

In re Sullivan Condensed Milk Co., 291 Fed. 66, 68.

This Court not only went outside the stipulated facts but went even beyond the Special Master's report when it stated that "the evidence * * * showed that the landlord had made substantial changes."

A stipulation is designed to restrict issues or to settle disputed facts, or both, and it is binding, unless cause is shown for setting it aside. Brooklyn Mining Co. v. Miller, 227 U. S. 194, 201; United States v. Davison, 1 F. (2d) 465, 469, 470; Schmertz Wire Glass Co. v. Continuous Glass

Press Co., 216 Fed. 828; McNeill v. Town of Andes, 40 Fed. 45.

Counsel for the Trustee have not urged and cannot urge any valid reason for being permitted to avoid the effect of their stipulation or to introduce new evidence in support of a new issue. They cannot claim mistake, fraud or surprise—they were at all times entirely familiar with all the relevant facts, since they were also counsel for the trustee [fol. 83] in bankruptcy in the prior bankruptcy proceeding. The stipulations did not reserve to any party the right to introduce additional proof.

The present case should be compared with General Utilities & Operating Co. v. Helvering, 80 L. Ed. 174, in which the case was submitted to the Board of Tax Appeals upon one issue and an agreed statement of facts. The Circuit Court of Appeals reversed a decision in favor of the taxpayer, on an entirely new issue, in support of which it made certain inferences of fact in conflict with the stipulated facts. The Supreme Court reversed, saying (p. 177):

"Here the court undertook to decide a question not properly raised. Also it made an inference of fact directly in conflict with the stipulation of the parties and the findings, for which we think the record affords no support whatever. To remand the cause for further findings would be futile. The Board could not properly find anything which would assist the Commissioner's cause.

See also Helvering v. Salvage, 80 L. Ed. 356, and Compania General v. Collector, 279 U. S. 306. In the latter case, the Supreme Court held for the government on the grounds that the burden was on the taxpayer to establish facts showing the invalidity of the assessment, and the statement of facts agreed to was not sufficient to sustain such burden.

The burden of proving surrender is also on the party relying on surrender (see cases cited at pp. 45, 46 of our Brief), and that burden has not been met here.

Even in an action at law, where the Seventh Amendment is applicable, an appellate court will, upon a reversal of [fol. 84] a case submitted upon an agreed statement of facts, direct the entry of final judgment without remanding for a new trial. Thomas v. Matthiessen, 232 U. S. 221, 236; United States v. Illinois Surety Co., 226 Fed. 653, 664 (C. C. A. 7); Massachusetts Bonding & Ins. Co. v. Santee,

62 F. (2d) 724, 728 (C. C. A. 9); Maryland Casualty Co. v. Beebe, 54 F. (2d) 743, 746.

The appellant has been subjected to over a year of litigation before the Special Master, in the District Court and in this Court, at considerable expense, on a question of law raised by an agreed statement of facts, which question of law this Court has just determined in her favor, to wit: that a landlord in New Jersey may relet without effecting a surrender. And, as we have shown, even if all the facts referred to by the Special Master and by this Court, and all reasonable inferences which could be drawn therefrom, were proven on another trial, they would not establish a surrender as a matter of law.

This Court ought not to remand for a new hearing on the merits under such circumstances, but should reverse with instructions that the claim be allowed, subject to proof of the amount of damages, which is the only issue reserved by the stipulations.

In any event, it is clear that this Court should not affirm, without remanding for a new hearing on the merits, on the basis of an alleged fact not contained in the agreed statement of facts. If this appeal is not to be decided upon the single issue presented in the record and upon the facts as stipulated with reference to that issue, as we insist it should be, then, at the very least, the appellant is entitled to her day in court and an opportunity to establish the actual facts.*

[fol. 85] Wherefore, appellant respectfully prays this Honorable Court for a rehearing of the appeal herein.

Dated, April 14th, 1936.

City Bank Farmers Trust Company, by Mitchell, Taylor, Capron & Marsh, Its Attorneys and Solicitors. Of Counsel: Rollin Browne. Henry L. Glenn.

We hereby certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

Rollin Browne, Henry L. Glenn, Attorneys and Solicitors for the Appellant.

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* We do not intend, by making this point, to concede that respondents have any right to a further hearing on the merits, or to enlarge the issue or to supplement their stipulations by further proof.

[fol. 86] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of

UNITED CIGAR STORES COMPANY OF AMERICA, Debtor

CITY BANK FARMERS TRUST COMPANY, Assignee of Florence H. Bugbee, Appellant

IRVING TRUST COMPANY, as Trustee of the Estate of the Above-named Debtor, et al., Appellees

Before Manton, Augustus N. Hand and Chase, Circuit Judges

Rollin Browne, Esq., Henry L. Glenn, Esq., Attorneys and Solicitors for the Appellant.

Per CURIAM:

Petition for rehearing denied.

——— ———, ——— ———, Circuit Judges,

Filed May 21, 1936.

[fol. 87] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the 21st day of May, one thousand nine hundred and thirty-six.

Present: Hon. Martin T. Manton, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

In the Matter of

UNITED CIGAR STORES COMPANY OF AMERICA, Debtor

CITY BANK FARMERS TRUST COMPANY, as Assignee, etc., Appellant

A petition for a rehearing having been filed herein by counsel for the appellant;

Upon consideration thereof it is

Ordered that said petition be and hereby is denied.

Wm. Parkin, Clerk.

[fol. 88] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re United Cigar Stores Company of America. Order. United States Circuit Court of Appeals, Second Circuit. Filed May 21, 1936. William Parkin, Clerk.

[fol. 89] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 88, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of In the Matter of United Cigar Stores Company of America, Debtor; City Bank Farmers Trust Company as Assignee, etc., Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 30th day of June, in the year of our Lord one thousand nine hundred and thirty-six, and of the Independence of the said United States the one hundred and sixtieth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 90] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 26, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following No. 151.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.